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No. 99-1379

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC., *Petitioner*,

v.

SAINT CLAIR ADAMS, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
for the NINTH CIRCUIT

BRIEF OF THE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW YORK, NORTH DAKOTA, PENNSYLVANIA, VERMONT, WASHINGTON, AND WEST VIRGINIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act should be interpreted to apply to contracts of employment when such an interpretation will necessarily preempt a significant body of state law intended to protect workers' rights and to promote the public policy of eliminating invidious employment discrimination.

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INTEREST OF THE AMICI CURIAE

The Attorneys General of the amici States have a vital interest in the resolution of this case. As constitutional officers of the States they represent, the Attorneys General have the responsibility to oversee enforcement of employment laws, and particularly employment discrimination laws, within their jurisdictions. Many of the States, either through legislation or in the decisions of their courts, have expressed a public policy based opposition to enforcement of mandatory arbitration agreements where individual statutory employment rights are involved. The States' strong interest in providing public forums to their citizens seeking adjudication of claims involving important statutory rights, particularly in the area of employment discrimination, compels amici to participate in this case.

The States strongly support the use of alternative dispute resolution procedures when there is an extant dispute to be resolved and when both parties voluntarily agree to resolve the dispute via arbitration or some other alternative procedure. Ultimately, however, each State should be permitted to make its own determination regarding the enforceability of mandatory arbitration agreements in the context of employment relations. Interpretation of the Federal Arbitration Act to include contracts of employment would have the effect of preempting a significant body of state law. This would deprive the amici States of their ability effectively to regulate in an important area of traditional state police power.

SUMMARY OF ARGUMENT

Our federal system of dual sovereignty leads to a presumption that Congress does not preempt state law in areas traditionally regulated by the States. To find preemption in

such areas, the Court requires a clear and manifest statement of congressional intent.

The law of employment relations--and particularly employment discrimination law-- is an area of traditional state authority. The States play a vital role in the development of employment discrimination law and they have a vital interest in enforcing their laws in this area. In furtherance of this interest, many States provide low-cost alternative forums for adjudication of employment discrimination claims.

Mandatory preemployment arbitration agreements like the one at issue in this case can frustrate the purposes of state civil rights laws by removing employment-related disputes from public forums and by depriving individual employees of procedural and substantive rights. For this reason, a significant number of States have enacted legislation regulating the enforceability of such agreements. In other States, such agreements have been determined to be unenforceable as a matter of public policy.

Interpretation of the Federal Arbitration Act to reach contracts of employment would have the effect of preempting state law wherever the employer can demonstrate a connection to interstate commerce. This would result in a federalization of employment law which Congress certainly did not intend.

This case raises an additional issue of federalism and comity. The federal district court in this case issued an injunction prohibiting the state court from exercising its jurisdiction. This injunction, unaccompanied by any analysis of the profound policy issues implicated, is an unwarranted derogation of state courts' ability to interpret and enforce the law and constitutes a significant affront to federalism. Interpreting the Federal Arbitration Act to exclude contracts of employment will help to remedy an unfortunate trend in this area.

Petitioner's argument that national uniformity in this area is necessary to avoid local inconsistencies ignores the basic

federal principle that States are authorized to regulate local matters as local conditions warrant. In particular, the States should be free to enact and enforce laws protective of the civil rights of their citizens.

ARGUMENT

INTRODUCTION

The amici States are persuaded by the arguments of Justice Stevens[1/] and by the consensus of legal scholarship [2/] that, in enacting the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in 1925, Congress intended to and did exclude all contracts of employment from its coverage. Respondent and other amici have provided the Court with a thorough

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1. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-43 (1991) (Stevens, J., dissenting.)

2. *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996); Matthew W. Finkin, *Employment Contracts Under the FAA -- Reconsidered*, 48 Labor L.J. 329 (1997). In addition to Professor Finkin's two articles, the Ninth Circuit relied upon articles by nine other commentators in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), including Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv.L.Rev. 591 (1954), reaching or supporting the same conclusion. To these can be added Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1, 19 (1996) and Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U.Pa.L.Rev. 91, 193, n. 438 (1998) ("The federal courts have typically found that the FAA applies to employment disputes despite statutory language that would seem to preclude such coverage.").

recapitulation of the textual analysis and legislative history underlying these opinions. It is not necessary to repeat those arguments here. Rather, this brief addresses important issues of state sovereignty and federalism necessarily implicated in the question before the Court.

The Court's consideration of this question should be informed by the knowledge that an interpretation of the FAA to apply to contracts of employment will seriously impair the States' ability to enact and enforce laws protective of employees by preempting a significant body of state law in an area traditionally within the States' police power. This case also raises serious issues of comity and federalism relating to the propriety of federal court injunctions prohibiting state courts from exercising their jurisdiction in cases raising only state law claims. In the absence of any clear and manifest congressional intent to supersede state law, these considerations should weigh heavily against interpreting the FAA to include contracts of employment.

I. THE PRESUMPTION AGAINST PREEMPTION IN AREAS OF TRADITIONAL STATE POLICE POWER AUTHORITY ARGUES STRONGLY AGAINST INTERPRETING THE FAA TO REACH CONTRACTS OF EMPLOYMENT.

A. Our Federal System of Dual Sovereignty Leads to a Presumption Against Preemption of State Law in Areas Traditionally Regulated by the States in the Absence of an Unambiguous Statement of Congressional Intent.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Within this system, the Federal Government is vested with limited

powers, while the States retain substantial sovereign authority. *Id.*

"This federalist structure of joint sovereigns preserves to the people numerous advantages." *Id.* at 458. Among these are a decentralized government more sensitive to the diverse needs of society, the opportunity for more innovation and experimentation in government, and increased responsiveness of state governments as they compete for a mobile citizenry. *Id.* at 458. This federalist system requires a proper balance between the States and the Federal Government. "In the tension between federal and state power lies the promise of liberty." *Id.* at 459.

These considerations counsel caution in examining federal legislation arguably preemptive of state law in areas of traditional state authority. While "Congress may legislate in areas traditionally regulated by the States" as long as it acts "within the powers granted it under the Constitution," the Court "must assume Congress does not exercise [this power] lightly." *Id.* at 460.

The Court presumes that "Congress does not intend to supplant state law," *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Indeed, in cases "where federal law is said to bar state action in fields of traditional state regulation," the Court operates "on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 655, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

"[T]he preemptive effect of a federal statute is fundamentally a question of congressional intent." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). And "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory,*

501 U.S. at 460, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted).

The Court uses "special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause." *Id.* at 463 n. 1. In this context, the Court "must be absolutely certain" of congressional intent. *Id.* at 464. "[M]ere congressional ambiguity" cannot be allowed to displace state legislation. *Id.* The Court's deference to the principle of dual sovereignty serves to maintain the vital "distinction between what is truly national and what is truly local." *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

B. Employment Law Is An Area of Traditional State Regulation And Preemption Should Not Be Lightly Inferred In This Area.

In our federal system, employment law is clearly within the traditional police power of the States.[3/] This Court has frequently ratified the States' authority to regulate the employment relationship as a valid exercise of the police power. Pertinent examples include *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a Utah statute regulating the employment of miners and mandating an eight-hour day); *St. Louis, Iron Mountain etc. Railway v. Paul*, 173 U.S. 404 (1899) (upholding an Arkansas law requiring that discharged

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3. In this brief, the term "employment law" refers to all labor market regulation other than legal regulation of unions and the collective bargaining process. It includes non-discrimination statutes, wage and hour laws, regulation of workplace safety, and wrongful discharge doctrines. *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L.Rev. 469, 472 n.6 (1993).

railway workers receive back wages); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901) (upholding a Tennessee law requiring that employer scrip for wages be redeemable in cash rather than merchandise); and *McLean v. Arkansas*, 211 U.S. 539 (1909) (upholding an Arkansas law mandating that miners be paid by the weight of coal they mine before it is screened). In 1914, the Court upheld a New York statute requiring that railroads pay their employees semi-monthly and prohibiting employment contracts that would evade or nullify this statutory requirement. *Erie R. Co. v. Williams*, 233 U.S. 685 (1914).

The Commerce Clause does not divest the States of their power to regulate matters of local concern, even when the regulation may have an effect on interstate commerce. *California v. Thompson*, 313 U.S. 109, 113 (1941) (upholding a California statute requiring licensure of transportation agents). In *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), the Court upheld a Colorado statute prohibiting employment discrimination on enumerated bases including race, observing that "the hiring within a State of an employee, even for an interstate job," is a "localized matter." *Id.* at 721.

Discrimination in the workplace is especially a matter suitable for state regulation. The Court has held that statutes addressing workplace discrimination lie solidly within a State's "regulation of its internal affairs." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 95 (1945). Indeed, both Congress and this Court have acknowledged the special role the States have played in the development of employment discrimination law. The text of Title VII, for example, "reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity." *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 283 (1987). As the Court noted in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100-104 (1983), States may extend their

anti-discrimination laws more broadly than federal law; Title VII does not preempt state laws extending broader employment protection.[4/]

In short, in regulation of the employment relationship, "[f]ederal law ... is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal [enactment]." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Hence, because "the establishment of labor standards falls within the traditional police power of the State," "pre-emption should not be lightly inferred in this area." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

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4. In his famous dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932), Justice Brandeis observed: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Nowhere is this argument more apt than in the area of employment discrimination law. Many States, for example, prohibited private-sector disability discrimination before the 1990 passage of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. At least 35 States had some type of official policy concerning family and medical leave prior to enactment of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq*. Drummonds, *supra* note 3, at 490 nn. 112-113.

C. The States Have a Vital Interest in Protection of Workers and Advancement of Public Policy Through Enforcement of Their Employment Laws; This Interest Is Compromised If Employment Discrimination Claims Are Removed From the Jurisdiction of State Courts and State Agencies.

Just as the States play a special role in the development of employment law, and particularly employment discrimination law, so they have a particular interest in guaranteeing their citizens protection of their legal rights and in overseeing the vindication of public policy in this area. These concerns have led, in many States, to the establishment of administrative forums which provide low cost alternatives for adjudication of employment-related claims.

In California, for example, an employee who feels he or she has suffered illegal workplace discrimination can file a complaint with the Department of Fair Employment and Housing, have the matter investigated, have the case conciliated, and, if that fails and the Department considers the complaint meritorious, have the matter decided by the Fair Employment and Housing Commission, all at the State's expense. Cal. Gov. Code, §§ 12900 *et seq*. Similar administrative forums exist for adjudication of wage disputes, unemployment cases, and workers' compensation claims. Cal. Lab. Code, §§ 98 *et seq*., Cal. Unemp. Ins. Code, §§ 1326 *et seq*., Cal. Lab. Code, §§ 5300 *et seq*. Under some preemployment arbitration agreements, these administrative

alternatives to litigation are foreclosed.[5] Nor can an aggrieved employee seek enforcement of statutory rights in state court.

It is evident that use of such binding arbitration agreements is on the increase. In its Petition for Writ of Certiorari, Circuit City stated that it alone employs approximately 60,000 workers potentially subject to such dispute resolution agreements. (Petition for Writ of Certiorari at 13.) Circuit City also refers to "large national employers" "who use the same arbitration agreement for their entire workforce" and to the "many hundreds of thousands of employees"subject to such agreements nationwide. (*Id.* at 10.) Over ten years ago, it was estimated that from eight to ten percent of the entire workforce of the United States was covered by such agreements.[6]

From a public policy perspective, whether this development is salutary or pernicious may be a subject of legitimate debate. Certainly, however, the wholesale removal of statute-based employment claims from public forums and their relegation to private dispute-resolution procedures with no provision for judicial review or public scrutiny raises significant issues particularly pertaining to the enforcement of civil rights laws.

The Equal Employment Opportunity Commission (EEOC) has addressed some of these issues in its policy statement on mandatory arbitration. As the EEOC notes, the

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5. The dispute resolution agreement between Petitioner and Respondent in this case appears to allow individual employees to "file administrative charges" with responsible state agencies. (J.A. at 13, 22.) It is not clear whether employees can actually take employment discrimination charges to an administrative hearing or judicially enforce monetary awards resulting from such administrative proceedings. (*Id.*)

6. *See* the surveys reported in Stone, *Employment Arbitration Under the Federal Arbitration Act* in Employment Dispute Resolution and Worker Rights 57 (IRRA, 1989).

arbitration process is private and allows for little public accountability. Since arbitration decisions are seldom accompanied by written opinions, they do not foster development of the law as the published decisions of courts and administrative agencies do. Arbitration is generally unsuitable for resolution of class actions or pattern and practice claims of discrimination. Procedural protections, such as the right to jury trial and discovery, are often unavailable to the aggrieved employee in arbitration. Arbitration systems also incorporate structural biases which tend to favor the more frequent user of the system. *See* EEOC *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, EEOC Notice Number 915.002, July 10, 1997.

Further problems of fairness can arise when statutorily guaranteed employment rights are consigned to arbitration. These include the inherent advantage employers have in selection of arbitrators, potentially insurmountable financial barriers to the arbitration process for an individual worker, loss of the right to legal counsel, and waiver of rights available under state law, such as a shortening of the statute of limitations and waiver of statutory remedies. Grodin, *supra* note 2, at 42-48.[7]

To some extent, the systemic features which make arbitration a questionable substitute for the courts and administrative agencies in this context are inherent in the nature and history of the arbitration process itself. Arbitration in the United States has generally been "a nonlegal process, often conducted by nonlawyers...." Paul D.

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7. *See also* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems*?: *Repeat Players in ADR*, 15 J. Disp. Resol. 19, 39, 44 (1999), summarizing employment lawyers' criticisms of mandatory agreements to arbitrate statutory employment claims and noting that "repeat players" seem to fare better in certain kinds of employment arbitration.

Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 344 (1996). The arbitrator's task is to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982) (internal citations omitted). The arbitrator's specialized competence is "the law of the shop, not the law of the land," and "the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Id.* Even if qualified to do so, arbitrators have been under "no duty to resolve a dispute in compliance with the parties' legal rights." Carrington, *supra*, at 345. Rather, they tend to seek a resolution "that is equitable, minimizes harm to either party, and enables potential adversaries to maintain a valuable commercial relationship," often by "halving the objects in dispute." *Id.* This predisposition toward compromise rather than scrupulous attention to legal rights, though admirable in the resolution of commercial disputes, may be incompatible with the States' interest in vindication of important public policy objectives through vigorous enforcement of statutory employment rights.

This Court's own opinions reflect a deep skepticism that arbitration is an appropriate mechanism for the vindication of statutory employment rights. In 1967, the Court strongly suggested that it did not then interpret the FAA to apply to any contracts of employment, noting that "categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1." *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 403 n. 9 (1967). *See also* the National Labor Relations Act, 29 U.S.C. § 151, explicitly recognizing the disparity of bargaining power between employers and individual employees.

A few years later, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court considered whether arbitration could provide an adequate substitute for the federal courts in

the vindication of Title VII claims and concluded that it could not. The Court noted first the public policy function implicit in any private Title VII case: "[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.* at 45. Later, the Court commented upon the role of the arbitrator:

> He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. *Id.* at 52-53 n. 16.

Finally, the Court enumerated some of the ways in which arbitral processes are "comparatively inferior to judicial processes in the protection of Title VII rights." *Id.* at 57. These include the arbitrator's lack of expertise in the governing law, the lack of procedural safeguards, and the lack of a comprehensive record. *Id.* at 57-58. These considerations led to the conclusion that "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51.[8/]

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8. More recently, the Court has noted, but has not resolved, the "tension" between *Gardner-Denver* and *Gilmer v. Interstate/Johnson Cane Corp.*, 500 U.S. 20 (1991) (holding that a stockbroker's agreement to arbitrate disputes with his employer as required by the rules of the New York Stock Exchange was enforceable, but explicitly reserving the question whether the FAA excludes "contracts of employment"). *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76 (1998). Amici submit that this tension is attributable, in part, to a natural reluctance to deprive an individual worker of statutorily-guaranteed rights on the strength of a contract whose terms he could not realistically negotiate.

In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), both the majority and the dissenting opinions reflected doubt that arbitration provided an appropriate mechanism for resolution of statutory employment discrimination claims and a conviction that Congress did not intend that such claims would be subject to binding arbitration. As Chief Justice Burger noted:

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

Id. at 750 (Burger, C.J. dissenting).

In a unanimous decision in 1987, the Court said that the presumption in favor of arbitration does not apply to statute-based employment claims. Citing *Barrentine*, along with *Gardner-Denver* and *McDonald v. West Branch*, 466 U.S. 284 (1984), Justice Stevens wrote: "[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Atchison T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 565 (1987), quoting *Barrentine, supra,* at 737 (construing the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, but noting that the underlying theory applies regardless of the particular arbitration statute under review).

Different jurisdictions may choose to address doubts about the appropriateness of arbitration to resolve statute-based claims of individual workers against their employers in a variety of different ways. Under our federal system,

however, the States--in the exercise of their traditional police power authority and with their expertise regarding local conditions--should be permitted to formulate their own individual approaches to this problem.

D. A Significant Number of States Have Addressed These Issues in Statutory Enactments and State Court Decisions; If the FAA is Interpreted to Apply to Contracts of Employment, These State Laws Would Be Subject to Preemption Wherever the Employer Has a Connection to Interstate Commerce.

Many States have already addressed the issues raised by arbitration agreements in employment contracts. Arizona, for example, exempts such contracts from the scope of its arbitration act; the States of Kentucky, Louisiana, Oklahoma, and Wisconsin have similar statutory provisions.[9/] Other States, including Arkansas, Iowa, and Kansas, allow for the enforcement of arbitration agreements between employers and employees generally, but preclude enforcement of agreements to arbitrate future disputes in this context.[10/]

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9. Ariz. Rev. Stat. § 12-1517 (2000) (exempting "arbitration agreements between employers and employees or their respective representatives" from the State's arbitration act); Ky. Rev. Stat. § 417.050 (1998) (same); La. Rev. Stat. §§ 9:4216 (2000) (excluding "contracts of employment of labor"); 15 Okl. St., § 818 (1999) (excluding "employer and employee relations"); and Wis. Stats. § 788.01 (1999) (excluding "contracts between employers and employes, or between employers and associations of employes").

10. Ark. Stat. Ann. § 16-108-201 (1999) (exempting agreements to submit to arbitration "employer-employee disputes" "thereafter arising between the parties" from the State's arbitration act); Iowa Code § 679A.1 (1999) (exempting "[a] contract between employers and employees" "to submit to arbitration a future

Kentucky and South Carolina prohibit imposition of an agreement to arbitrate employment disputes as a condition of employment. Ky. Rev. Stat. § 336.700 (1998); S.C. Code Ann. § 15-48-10 (1999). The arbitration acts of Idaho, Maryland, New Hampshire, and North Carolina each contain a presumption that the act shall not apply to arbitration agreements between employers and employees unless the agreement provides otherwise; in Maryland, New Hampshire, and North Carolina, to be enforceable the agreement must make specific reference to the applicable statute. Idaho Code § 7-901 (1999); Md. Cts. and Jud. Proc. Code Ann. § 3-206 (1999); New Hampshire Rev. Stat. Ann. § 542:1 (1999); N.C. Gen. Stat. § 1-567.2 (1999). In Georgia, an arbitration agreement in a "contract relating to terms and conditions of employment" is not enforceable unless the arbitration clause is initialed by all signatories at the time of the contract's execution. Off. Code Ga. Ann. § 9-9-2 (2000).

In addition, the generally-applicable arbitration law of some States affects the enforceability of pre-dispute agreements to arbitrate employment disputes. For example, the laws of Alabama and Nebraska preclude the enforcement of agreements to arbitrate future disputes.[11] Vermont and a

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controversy"), and Kan. Stat. Ann. § 5-401 (1999) (exempting "contracts between an employer and employees, or their respective representatives" "to submit to arbitration any controversy thereafter arising").

11. Ala. Code § 8-1-41 (2000) (providing that an arbitration agreement cannot be specifically enforced); *Ex Parte Clements*, 587 So.2d 317, 319 (Ala. 1991) ("[u]nless the FAA is applicable, pre-dispute arbitration agreements are void in Alabama as against public policy"); *State v. Nebraska Ass'n of Public Employees*, 239 Neb. 653, 477 N.W.2d 577, (1991) (holding the Nebraska Uniform Arbitration Act violates the Nebraska Constitution to the extent it requires enforcement of agreements to arbitrate future disputes).

number of other States have imposed procedural prerequisites aimed at assuring notice and consent for the enforcement of any arbitration agreement.[12] In the absence of preemptive federal law, these statutory safeguards would be applied to contracts of employment.

In several States, the courts have addressed these issues. The courts of Iowa, Minnesota, New York, and West Virginia, for example, have held that contracts to arbitrate employment discrimination claims violate the States' public policy and are, therefore, unenforceable.[13]

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12. *See* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 403-404 (1992), and Grodin, *supra* note 2, at 18.

13. *Polk County v. Civil Rights Com'n*, 468 N.W.2d 811, 816 (Iowa 1991) ("[T]he arbitration of civil rights violations is against public policy."); *Correll v. Distinctive Dental Services, P.A.*, 607 N.W.2d 440 (Minn. 2000) (where the FAA does not preempt state law, the Minnesota Human Rights Act provides the exclusive method of resolving employment discrimination claims under the Act and voids arbitration agreements purporting to waive the right to a judicial forum); *Wertheim & Co. v. Halpert*, 48 N.Y.2d 681, 397 N.E.2d 386, 387, 421 N.Y.S.2d 876 (1979) ("Although arbitration is a favored method of dispute resolution, arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced."); and *Copley v. NCR Corp.*, 183 W.Va. 152, 394 S.E.2d 751, 756 (1990)("[U]nder West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to [state statute]."). *See also Steck v. Smith Barney, Harris Upham & Co., Inc.*, 661 F.Supp. 543, 548 (D.N.J. 1987) (suggesting that the New Jersey Supreme Court would read that State's Law Against Discrimination as precluding arbitration of employment discrimination claims and, in the absence of the FAA, an agreement to arbitrate such claims would be unenforceable under state law.) *But see Alamo Rent A*

Michigan and California have taken a different approach. In Michigan, pre-dispute agreements to arbitrate employment discrimination claims are enforceable, but only so long as "the employee does not waive any rights or remedies under the statute and the arbitral process is fair." *Rembert v. Ryan's Steak Houses*, 596 N.W.2d 208, 230 (Mich.App. 1999). Among other things, the *Rembert* decision requires that the employee have clear notice of the agreement to arbitrate and requires that the arbitration process provide the right to legal counsel, reasonable discovery, a fair hearing, and a neutral arbitrator. In addition, the arbitration decision must be in writing and must contain findings of fact and conclusions of law and the prevailing employee is entitled to attorney fees. *Id.*

The California Supreme Court recently held a pre-employment agreement to arbitrate employment discrimination claims unenforceable on the grounds that it violated public policy and was unconscionably unilateral. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, ___ Cal. 4th ___, ___ P. 2d ___, ___ Cal. Rptr.2d ___, 2000 Cal. LEXIS 6120, No. S075942 (August 24, 2000), the court held that such agreements may be valid and enforceable, but only if they incorporate substantive and procedural protections. Specifically, they must allow for recovery of all types of relief otherwise available in court. They must also provide for neutral arbitrators, adequate discovery, and written arbitration awards. The agreement may not require the employee to pay "either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Id.*, slip opinion at 18.) Finally, the agreement must evidence "a

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Car, Inc. v. Galarza, 306 N.J. Super. 384, 703 A.2d 961, 964 (N.J. Super.A.D. 1997) (holding that the Law Against Discrimination does not preclude enforcement of agreements to arbitrate employment discrimination claims but declining to enforce such an agreement on other grounds).

modicum of bilaterality," (*id.* at 39), that is, the employee cannot be bound to submit his claims to arbitration if the employer is free to litigate its claims in court.[14]

If the FAA is interpreted to apply to contracts of employment, it will necessarily preempt all the state statutes cited above whenever the employment relationship is subject to an arbitration agreement and the employer can show a connection to interstate commerce. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the FAA, but "state laws applicable *only* to arbitration provisions" are preempted.) (Emphasis in original.) In addition, it will call into question most or all of the state court decisions holding such agreements unenforceable as a matter of public policy. This will have the effect of nullifying most state law already in place limiting the enforceability of arbitration agreements in the employment context and of stifling further development of state law in this important area.

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14. The dispute resolution agreement at issue in this case appears to be unilateral, binding upon the employee but not upon Circuit City. (J.A. at 21-22.) Its damages limitations appear inconsistent with the provisions of the State's employment discrimination law. (*See* J.A. at 35-36, *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211, 221, 649 P.2d 912, 185 Cal. Rptr. 270 (1982), and Cal. Gov. Code § 12970.) In addition, the agreement provides that the employee "shall pay one-half of the costs of arbitration" unless he prevails, in which case the arbitrator "may require that Circuit City pay the [employee's] share of the costs." (J.A. at 33-34.) On the other hand, if Circuit City prevails, the employee may be required to pay *all* costs of arbitration. (*Id.*) On these bases, this agreement would probably be held unenforceable under California law.

At one stroke, the carefully crafted individualized approaches the States have taken to this issue would be supplanted by a "federal common law" of employment. Yet Congress has never undertaken to address the difficult issues of public policy inherent in the enforcement of arbitration agreements between employers and their individual employees. Consequently, once the States are divested of their authority to enact protective legislation in this area, there will be a void in the law, with little but an inapposite presumption in favor of arbitration to guide the courts.

E. The FAA Does Not Reflect the Requisite Congressional Intent to Preempt State Law In This Area.

Neither the text nor the legislative history of the FAA evidence the clear and manifest intent required to preempt state authority in this vital area. Certainly, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences v. Leland Stanford Jr. U.* 489 U.S. 468, 477 (1989). "More importantly, the legislative history of the FAA reveals no indication that Congress intended to supplant state arbitration law nor even an awareness that state law would be affected." Strickland, *supra* note 12, at 454 n. 345.

The consensus of legal scholarship is that the exclusion of section 1 of the FAA was intended to encompass all contracts of employment. Even those who favor extending the FAA to cover most employment contracts acknowledge

light of the caveat that congressional ambiguity should not be construed as expressing an intent to preempt state law in traditional areas of state regulation, the amici States urge the Court to interpret the FAA to exclude contracts of employment.

II. THIS CASE ILLUSTRATES A SECOND SIGNIFICANT ISSUE OF CONCERN TO THE STATES: THE INCREASING TENDENCY OF FEDERAL COURTS TO ISSUE UNWARRANTED INJUNCTIONS AGAINST STATE COURTS, SUPPOSEDLY IN FURTHERANCE OF THE FAA'S POLICY TO ENCOURAGE ARBITRATION.

One aspect of the FAA's potential "federalization" of employment law warrants additional discussion. In this case, the federal district court enjoined a state court from exercising its jurisdiction. This injunction was accompanied by virtually no analysis and relied solely upon the authority of the FAA. This constitutes a serious affront to comity and the principles of cooperative federalism and illustrates another derogation of state sovereignty which would be avoided--at least in employment cases--by properly interpreting the FAA to exclude contracts of employment.

In this case, a California citizen filed an action against Circuit City and three Circuit City employees in California superior court on November 26, 1997. (J.A. at 10.) The suit was based upon California's Fair Employment and Housing Act (FEHA), Cal. Govt. Code §§ 12900 *et seq.*, and on state

of action. There was no basis for federal jurisdiction over the case.[17]

Circuit City did not seek to remove the case to federal court. Instead, relying upon an assertion of diversity of citizenship between itself (but not the other defendants) and the plaintiff, it filed a Petition to Stay State Court Action and to Compel Arbitration in United States District Court. The district court granted this petition and, on April 29, 1998, with virtually no discussion or analysis of the issues involved, issued an order staying the proceedings in the California state court action pending completion of the arbitration of plaintiff's dispute with defendants. (J.A. at 43-45.) This injunction, purporting to suspend the authority of a court of the sovereign State of California to exercise its jurisdiction over a case properly filed before it and in which the plaintiff asserted only state law claims, raises fundamental concerns of comity and federalism.

Our system of federalism reflects a general policy under which state court proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme] Court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988)(quoting *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970)). As the Court has repeatedly enunciated, American jurisprudence assumes that state courts can be relied upon to enforce federal laws and policies. *See, e.g.*, *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S.

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17. "The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction .... [E]nforcement of the Act is left in large part to the state courts ...." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (emphasis added).

511, 518 (1955) (attesting to Congress's confidence in the state courts to enforce federal law).

When a federal court enjoins the exercise of a state court's jurisdiction, it seriously "disparages state courts' capacity for fairness." Sternlight, *supra* note 2, at 101. "Such injunctions, through which a federal entity completely shuts down the actions of a state court, may be seen as a direct threat to comity and federalism." *Id.* at 93.

Issuance of a federal injunction against a state court requires, at a minimum, careful consideration of the All Writs Act, 28 U.S.C. §1651(a), traditional equitable principles, the Anti-Injunction Act, 28 U.S.C. §2283, and various absention doctrines, each of which is extremely complex. *Id.* at 96. Yet, the federal district courts have been issuing such injunctions on the theory that they are necessary to effectuate the purposes of the FAA "without considering many of the statutes and doctrines that are directly on point." *Id.* at 97. As Professor Sternlight observes, almost none of the reported decisions examine the important policy questions raised by these cases; instead, they consist primarily of citations to earlier cases, themselves lacking in analysis. *Id.* at 98.

That characterization is unfortunately apt in this case. Here, after a cursory reference to the Anti-Injunction Act and an equally cursory reference to two of the cases Professor Sternlight cites as examples of the federal courts' failure of analysis,[18] the district court issued a stay enjoining the California superior court from any further activity in

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18. *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F.Supp. 488, 495 (N.D. Ga. 1988) and *Network Cinema Corp. v. Glassburn*, 357 F.Supp. 169, 172 (S.D. N.Y. 1973), cited in Sternlight, *supra*, at 97 n. 36. The court also made glancing reference to *"Circuit City v. Gonzales,"* evidently an unpublished decision of the United States District Court for the Eastern District of California. (J.A. at 51.) It merits noting that neither *Williams* nor *Network Cinema* is an employment case.

plaintiff's case. (J.A. at 50-51.) The district court appeared to believe that its injunction against the state court was authorized by *Moses H. Cone Hospital*, but that case does not support the proposition that federal courts may enjoin state courts from exercising their jurisdiction, even when the FAA is properly invoked.

In *Moses H. Cone Hospital*, the Court explicitly reserved the question "whether a federal court might stay a state-court suit pending arbitration under [the Anti-Injunction Act,] 28 U.S.C. 2283," recognizing that such an injunction would raise questions of federalism and comity that were not raised in that case. *Moses H. Cone Hospital,* 460 U.S. at 25 n. 32.[19] The Court has never revisited the issue.

In the years since *Moses H. Cone Hospital*, the Court has often made it clear that state courts, as well as federal courts, are obligated to enforce the provisions of the FAA. *See, e.g.*, *Southland Corp. v. Keating,* 465 U.S. 1, 10-16 (1984) (reversing a California court's refusal to compel arbitration under the FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269-70 (1995) (holding that an Alabama court erred in declining to enforce an arbitration agreement in a local contract); and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (reversing the Montana Supreme Court's decision that the trial courts of Montana need not

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19. In *Moses H. Cone Hospital*, the question was whether the United States District Court had erred in staying its own proceedings in favor of a prior-filed North Carolina state-court action arguably subject to the FAA. The Court ruled that, under the specific facts of the case, the district court ought to have issued an order to arbitrate the dispute between two of the contestants under section 4 of the FAA. The federal court's authority to stay state court proceedings pending the outcome of arbitration was not discussed or decided.

enforce arbitration agreements under the FAA if they do not comport with the procedural requirements of Montana's statutes). At this point, it seems well established that state courts have the same obligation to enforce the stay provisions of the FAA, where it applies, as do federal courts. Sternlight, *supra*, at 111. Hence, the concern expressed in *Moses H. Cone Hospital* regarding "the probable inadequacy of the state-court proceeding" to protect the rights of the party invoking the FAA (460 U.S. at 26) appears to have significantly diminished. Under these circumstances, *Moses H. Cone Hospital* cannot be interpreted to sanction the issuance of the injunction in this case.

As noted previously, the present case is emblematic of a disturbing trend. Federal courts "have been far too willing to grant such injunctions" against state courts under the supposed authority of the FAA. Sternlight, *supra,* at 198. When they do so without carefully considering the full array of policies and doctrines implicated, they "use the force of federal supremacy to subordinate state interests" and damage the relationship between federal and state courts. *Id.* at 203.

Amici States respectfully request that the Court take this trend into account in its consideration of this case. Interpreting the FAA not to apply to contracts of employment will not entirely resolve the problem, but it will direct a significant class of cases away from the hazards Professor Sternlight identifies. Congress assuredly did not intend that the FAA would become a juggernaut for eliminating state court jurisdiction over employment disputes. By eliminating the current uncertainty regarding the scope of the statute and clarifying that it does not apply to employment disputes, the Court can significantly ameliorate a situation seriously at odds with the principles of comity and federalism.

III. PETITIONER'S ARGUMENT FOR A NATIONALIZATION OF EMPLOYMENT LAW IS INCONGRUENT WITH OUR SYSTEM OF FEDERALISM.

Petitioner and several of the amici supporting its position argue that it is "anomalous" that "[a]n employer operating in several states and utilizing uniform procedures and a standardized arbitration agreement with its employees nationwide may find that the agreement is enforceable in some states but not in others...." (Brief for Petitioner at 34.) One amicus observes that state law is "quite literally, 'all over the map'" in regard to employment arbitrations. (Brief of Amicus Curiae the Council for Employment Law Equity In Support of the Petitioner at 14.) Some amici further argue that the Ninth Circuit's decision constitutes "[a] dangerous threat" to a "worthwhile employment practice," advantageous to employees and employers alike. (*Id.* at 2-3.) These arguments ignore our system of federalism and are ultimately unpersuasive.

First, the amici States are aware of no state law that prohibits employers and employees from voluntarily submitting their disputes to arbitration or to any other alternative dispute resolution process they choose. If arbitration is indeed fair and advantageous to employees, employees will readily submit their claims to arbitration. The state statutes and decisions cited in this brief address only the circumstance where one party no longer believes arbitration will be appropriate or equitable and the other party seeks to compel arbitration via the judicial process. Under these circumstances, some States have determined that, for reasons of public policy, some employer-employee arbitration agreements are unenforceable under some circumstances.

Second, the fact that the States have decided these issues differently properly reflects the fact that, under the Tenth Amendment, the States are free to take local conditions and

preferences into account in developing their laws. Regional differences will appropriately give rise to variations in employment law. This is an integral facet of our system of dual sovereignty. As Chief Justice Burger observed: "Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones." *EEOC v. Wyoming*, 460 U.S. 226, 264 (1983) (Burger, C.J., dissenting).

The FAA reflects no congressional intent to nationalize employment law. There is nothing unfair or inequitable in requiring employers who choose to do business in several States to abide by the laws each of those States enacts to protect its citizens. Petitioner and its amici seem to argue for a system in which the States may be divested of their traditional role in regulating conditions in the workplace. Under that system, employees' rights would no longer be protected by state legislatures and by the decisions of state appellate courts; instead, the rights and duties of the employment relationship would be determined by arbitration agreements drafted by corporate attorneys and made enforceable by federal law.

Congress has not made this policy decision. Heretofore, each State's authority to protect employment rights within its own jurisdiction has not been questioned. Amici States urge the Court to interpret the FAA to harmonize with, rather than to overturn, this integral feature of our constitutional system.

CONCLUSION

For the foregoing reasons, the amici States respectfully request that the decision of the Court of Appeals be affirmed.

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